Northeast Ohio District Council of Carpenters and Pile Drivers, Local Union No. 1929 of said District Council, AFL–CIO *and* Luedtke Engineering Company and Seafarers International Union of North America, AFL–CIO, Atlantic, Gulf, Lakes and Inland Water District, AFL–CIO. Case 8–CD–445

July 17, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on April 17, 1991, by the Employer, Luedtke Engineering Company (Luedtke), alleging that the Respondent, Northeast Ohio District Council of Carpenters and Pile Drivers, Local Union No. 1929 of said District Council, AFL–CIO (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represents rather than to employees represented by Seafarers International Union of North America, AFL–CIO, Atlantic, Gulf, Lakes and Inland Water District, AFL–CIO (Seafarers). The hearing was held on May 14, 15 and 16, 1991, before Hearing Officer Richard F. Mack. The Seafarers did not attend the 10(k) hearing. Luedtke, the Carpenters, and the Seafarers filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Luedtke Engineering Company, a Michigan corporation, is a marine construction company operating throughout the Great Lakes and Upper Mississippi area with its principal office in Frankfort, Michigan. Luedtke is currently engaged in constructing a fishing pier for the Ohio Department of Natural Resources at its Edgewater Park facility in Cleveland. The approximate value of the construction project is $770,000. Luedtke has received goods in excess of $50,000 at the Edgewater construction site directly from suppliers located outside the State of Ohio. We find that Luedtke is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters and the Seafarers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Luedtke commenced work on the Edgewater Park fishing pier project about April 8, 1991. Luedtke used crews of five consisting of two operating engineers and three seafarers. On April 15, 1991, William Lamb of the Carpenters learned from Luedtke Superintendent Vito Mellili that pile-driving work was scheduled 2 days later. On April 16, David Quinby, the Carpenters chief executive officer, telephoned Luedtke at its Michigan headquarters and asked that Luedtke sign a contract with the Carpenters and use carpenters to do the pile-driving work at the Edgewater site. Luedtke refused.

At approximately 6:50 a.m. on April 17, 1991, the Carpenters posted seven or eight pickets at the entrance to the jobsite. Their signs, directed to the public, stated that Luedtke's pile-driving work on the project was unfair to carpenters. When Luedtke Superintendent Mellili approached the picket line, Carpenters Representative Lamb told Mellili that the Carpenters would be forwarding a piledriver contract to Luedtke's home office. At approximately 7:55 a.m. the same day, the operating engineers left the jobsite pursuant to the instructions of their business agent, and those crewmembers who reported at the 3 p.m. shift change also declined to cross the picket line, which had increased in number to approximately 14. By 4:30 p.m., the pickets numbered 25 to 30. No work was performed on April 17. On April 18, 1991, 10 pickets were at the jobsite at approximately 6:40 a.m. and the crew declined to cross the picket line. When the picket line disbanded at approximately 10:40 a.m., the crew returned to work. At the time of the hearing, ''ice cones''[1] remained to be set at the worksite.

B. *Work in Dispute*

The disputed work involves marine pile-driving work associated with the installation of two circular cells, main and remote abutment structures to facilitate access ramps, and protective ice cones in the construction of a fishing pier for the Ohio Department of Natural Resources at its Edgewater Park facility in Cleveland.

C. *Contentions of the Parties*

Both Luedtke and the Seafarers contend that the disputed work should be awarded to employees represented by the Seafarers based on Luedtke's preference, its collective-bargaining agreement with the Seafarers, skills, economy, and efficiency. The Carpenters contends that its long-term, exclusive perform-

[1] Ice cones, which are ice shields, are placed in steel cylinders called ''cells'' that are pounded into the lake bottom. Pile-driving work includes construction of the ice cones.

ance of marine pile-driving work in the geographical area entitles it to the work. The Carpenters also relies on its collective-bargaining agreement with Luedtke.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

To obtain the disputed work, the carpenters picketed the worksite on April 17 and 18, 1991, thereby stopping all work on the fishing pier at that time. The Carpenters has not disclaimed interest in the disputed work. The Seafarers claimed, and performed, the disputed work. We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k).[2] Unlike our colleague, we view these facts as evincing a traditional jurisdictional dispute between two unions claiming the same work. The Employer assigned the disputed work to employees represented by the Seafarers. The Carpenters protested this work assignment with picketing which caused a delay in the work. While the Seafarers acknowledged to the Board that it ''accepted the work on the premise that the Carpenters' marine agreement had expired,'' this does not make the dispute contractual rather than jurisdictional. At no time during the work's performance did the Seafarers state that it did not wish to do the work or discipline its members for doing it. At all times the work continued to be performed by employees represented by the Seafarers. The failure of the Seafarers to disclaim the disputed work assigned to the employees it represented indicates that it continues to claim the work. See *Teamsters Local 50 (Schnable Foundation)*, 295 NLRB 68, 70 (1989), and cases cited there; *Iron Workers Local 197 (Del Guidice Enterprises)*, 291 NLRB 1, 3 (1988).

As for the Carpenters, we note that it has not sought either to quash the notice of hearing or seek to offer further evidence to establish the existence of a jurisdictional dispute; it simply contends that this is a jurisdictional dispute in which the factors weigh in favor of an award to Carpenters-represented employees. Neither does it rely on *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), affd. 827 F.2d 581 (9th Cir. 1987), cited by our colleague. In our view, that case—a nonconstruction industry case which involved the subcontracting of unit work formerly done by the employer's own unionized employees to a subcontractor with employees represented by a different union—is distinguishable from a case like this, in which one union claims that the Employer should continue, in keeping with past contracts, to assign work on new construction projects to employees it represents rather than to employees represented by another union. See *Iron Workers Local 197 (Del Guidice)*, supra; *Laborers (White Contracting)*, 290 NLRB 300, 301 (1988).

Accordingly, on a record which we regard as entirely adequate for these purposes, we find that the dispute is properly before the Board for determination.[3] We therefore believe our task under Section 10(k) of the Act is to resolve this dispute on the facts before us in order to avoid workplace strife with increased costs and attendant delays detrimental to employer and employee alike.

E. *The Collective-Bargaining Agreements*

The Board has certified neither the Seafarers nor the Carpenters as the collective-bargaining representative of any of Luedtke's employees. Since at least the 1950s, Luedtke has maintained successive collective-bargaining agreements with the Seafarers. Luedtke's current agreement with Seafarers covers the disputed work, but includes a clause limiting its application to those work situations that are not covered by a preexisting agreement with another labor union.

Luedtke also has maintained a collective-bargaining relationship with the Carpenters for more than 25 years. The last formal agreement between Luedtke and the Carpenters was effective for the period May 28, 1987, through April 30, 1988. This agreement, too, covered the disputed work. The agreement provided that it would automatically renew in the absence of a 60-day notice of intent to terminate.[4] Neither Luedtke nor the Carpenters gave the requisite notice in either 1988 or 1989. However, in a February 26, 1990 letter, David Quinby, the Carpenters chief executive officer, notified Luedtke that the April 30, 1990 date for termination of their marine pile-driving agreement was approaching and that it was the Carpenters' desire ''to negotiate, modify and amend'' the agreement. The letter also noted the concurrent ''attempt to negotiate a

[2] Luedtke's secretary, Chris E. Luedtke, testified without dispute that no other avenue was available for resolution of the dispute.

[3] Chairman Stephens notes that the determination that this case presents a jurisdictional dispute does not run afoul of his dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787 (1990), because, among other things, the Carpenters picketed in support of its claim to the work.

[4] Art. XIX, Duration and Modification

> This agreement shall be in effect as of May 1, 1987, and shall remain in force and effect to and including April 30, 1988, and shall be automatically renewed thereafter from year to year (or by Agreement for any longer period) at the wages and conditions existing on April 30, 1988, unless at least 60 days before the expiration date of any renewal period thereafter, written notice of termination is given by certified mail by either party to the other at his known business address. In case of such notice, a meeting of the parties shall be held at a mutually agreeable time and place.

Great Lakes Basin Agreement'' and the Carpenters' ''desire to be part of it'' if it became a reality. The letter, however, concluded with the notice that the Carpenters would be in contact with Luedtke ''to establish a time and place for local area negotiations.''

Luedtke contends that this letter terminated its collective-bargaining relationship with the Carpenters and that it therefore was free to assign the marine pile-driving work on the Edgewater project to employees represented by the Seafarers pursuant to its contract with that Union. The Carpenters claims that the February 26 letter was intended as a letter of renegotiation and was limited to the negotiation of a pay raise. It also contends that renegotiation was deferred because of the concurrent attempt to negotiate a Great Lakes Basin Agreement which would have applied to the disputed work. Both Luedtke and the Carpenters, however, agree that there was no agreement to delay negotiations between the two parties because of the Great Lakes Basin Agreement negotiations, which terminated without an agreement among the participating parties. The Seafarers in its brief to the Board, alleges that it ''accepted the work on the premise that the Carpenters marine agreement had expired.''

Based on the evidence presented in this proceeding, we find contrary to our dissenting colleague, that Luedtke's collective-bargaining agreement with the Carpenters expired on April 30, 1990. The Carpenters February 26 letter acted as a notice of termination pursuant to the agreement's own terms. The agreement made provision for neither continuation pending consummation of a new contract nor reopening limited to wages.[5] Further, there was no agreement between Luedtke and the Carpenters to delay negotiations on a new marine pile driving agreement because of the concurrent Great Lakes Basin Agreement negotiations. Whatever bargaining obligation between Luedtke and the Carpenters might have remained following the termination of the agreement, and the evidence before us is insufficient to determine if there was any obligation, there was no Carpenters-Luedtke agreement in existence in April 1991. There was, therefore, no restriction on Luedtke's assigning the disputed work to employees represented by Seafarers pursuant to its current contract with that Union.

In sum, we look to the state of the Employer's contractual obligations at the time it made the assignment of work. Because we construe the Carpenters February 26, 1990 letter as a termination letter, we are simply weighing the evidence of the Carpenters expired agreement (and predecessor agreements) against the evidence of the Seafarers' agreement, which was in force at the time of the assignment in the absence of ''a valid labor agreement with another recognized AFL–CIO union'' covering the work. In this context, it is meaningless to speak of an expired agreement as a ''valid'' agreement, since after expiration it is no agreement at all. Accordingly, the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by the Seafarers. See, e.g., *Stage Employees IATSE Local 41 (Greyhound Exhibitgroup)*, 270 NLRB 369, 370 (1984); *Longshoremen ILWU Local 54 (Hugo Neu Sales)*, 248 NLRB 775, 777 (1980).

F. *Employer Preference*

Chris Luedtke, Luedtke's secretary, testified that it was Luedtke's preference that the disputed work be assigned to employees represented by the Seafarers.

G. *Past Practice and Area Practice*

In the past 25 years, Luedtke usually hired employees represented by the Carpenters to perform marine pile-driving work in a five-county area of northeastern Ohio. The 1986 Wildwood Park project was the last time Luedtke used employees represented by Carpenters. The 1991 Edgewater Park project in dispute here is the first time that Luedtke has assigned the work to employees represented by the Seafarers.

Chris Luedtke testified that there was no industry practice controlling marine pile-driving work in the area. Of the limited number of companies performing this work, many are small, family-owned businesses. Currently, the majority operate nonunion, although at least one uses only operating engineers, and some companies use crews split between operating engineers and teamsters. At least two other companies besides Luedtke have used crews split between operating engineers and seafarers.

We find that past practice and area practice are inconclusive as to the assignment of the disputed work.

H. *Relative Skills*

Chris Luedtke testified that employees represented by Seafarers have the marine skills required for the marine pile-driving work. These employees are able to maneuver on the barges which often operate in rough weather, creating an unstable environment for the precision work. The Seafarers-represented employees are familiar with safety operations on the barges which precludes delays and accidents. Their cohesiveness as crews provides for expeditious performance of the work. Many are certified welders who have worked on tugs and barges all their lives. The Edgewater Park project involves dangerous work setting sheets, catching sheets, and placing interlock from a moving vessel, here a derrick boat 12. The employees represented by Seafarers have used this vessel annually and are famil-

[5] See, e.g., *Paterson Paper Co. v. Paper Makers*, 191 F.2d 252 (3d Cir. 1951); *Oakland Press Co.*, 229 NLRB 476, 478 (1977), enfd. in relevant part 606 F.2d 689 (6th Cir. 1979); *Speedrack, Inc.*, 293 NLRB 1054 (1989).

iar with its operation and safety features. The Seafarers seniority list reflects skill and leadership, and a cooperative safety program undertaken with Luedtke enables Luedtke to rely on that Union's certification of referred employees as physically fit.[6]

The Carpenters business representative, William Lamb, testified that employees represented by that Union had done ice cone work more recently than employees represented by the Seafarers. The Carpenters chief executive officer, David Quinby, testified that many of Carpenters-represented employees were also certified welders. However, he conceded that some employees represented by the Carpenters were less experienced than that and that a few had trouble doing the climbing necessary for marine pile-driving work.

We find that the factor of relative skills favors awarding the disputed work to employees represented by the Seafarers.

I. *Economy and Efficiency of Operations*

Chris Luedtke testified that employees represented by the Seafarers had interchangeable job skills whereas employees represented by the Carpenters did not possess this flexibility. He also testified that the Carpenters required larger crews than the Seafarers. Had Luedtke used the Carpenters crew size of eight rather than the Seafarers crew size of five (two operating engineers and three seafarers) it would have been unsuccessful in its bid for the Edgewater Park job. Carpenters Chief Executive Officer David Quinby testified that the Carpenters would have been willing to modify their crew size, but that negotiations would have been required.

[6] Luedtke's 1986 experience with employees represented by the Carpenters had not been favorable in this respect. Two of those employees had worksite accidents and at subsequent disability hearings were revealed to have previously adjudicated disabilities that jeopardized their work ability and may have contributed to their accidents on Luedtke's derrick boat.

We find that this factor favors awarding the work to employees represented by Seafarers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Seafarers are entitled to perform the disputed work. We reach this conclusion relying on the factors of collective-bargaining agreements, relative skills, economy and efficiency of operation, and employer preference. In making this determination, we are awarding the work to employees represented by the Seafarers and not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees represented by Seafarers International Union of North America, AFL–CIO, Atlantic, Gulf, Lakes and Inland Water District, AFL–CIO are entitled to perform marine pile-driving work associated with the installation of two circular cells, main and remote abutment structures to facilitate access ramps, and protective ice cones in the construction of a fishing pier for the Ohio Department of Natural Resources at its Edgewater Park facility in Cleveland.

2. Northeast Ohio District Council of Carpenters and Pile Drivers, Local Union No. 1929 of said District Council, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Luedtke Engineering Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Carpenters Local Union No. 1929 shall notify the Regional Director for Region 8 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D) to assign the disputed work in a manner inconsistent with this determination.